"inexorably" from this basic principle "is that the question of arbitrability . . . is undeniably an issue for judicial determination." *Id.* at 649. Furthermore,

> [a]lthough the Court has also long recognized and enforced a "liberal federal policy favoring arbitration agreements," . . . it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the *"question of arbitrability,"* is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."

Howsam, 537 U.S. at 83 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *AT&T*, 475 U.S. at 649; *First Options*, 514 U.S. at 944).

In support of its contrary argument, TXU quotes extensively from the Court's analysis in *First Options*, addressing whether parties may agree to submit *the question of arbitrability itself* to the arbitrators. Opp. at 25-26. That issue, however, is not implicated in this case because no party has ever claimed – and certainly there is no "clear and unmistakable evidence" – that MME and TXU ever intended the arbitrators to decide the question of arbitrability. TXU, of course, does not contend otherwise. Instead, TXU simply quotes the Court's discussion on this issue in *First Options* and then adds the bewildering statement that "a decision regarding the scope of a submission is more akin to the decision of 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' than it is to the question of arbitrability." Opp. at 26. This statement, however, simply demonstrates TXU's confusion (shared by several courts of appeals). The question whether the parties actually submitted an issue to an arbitrator for decision defines whether the parties intended the arbitrator to decide the issue just as much as the question whether the parties' arbitration clause in their pre-negotiated contract requires the issue to be submitted to arbitration. Both address "who" should decide the issue because, under sections 10(a) and 11(b) of the FAA, the district court may vacate or correct

an award to the extent that it involves the determination of a question that has not been submitted.

III. MME Did Not Waive The Question Presented.

TXU is similarly mistaken in asserting that MME waived the question presented by not arguing it below. To begin with, MME argued to the Third Circuit that "[i]n evaluating the scope of an arbitrator's authority, this Court evaluates both the parties' agreement to arbitrate and the submissions to the arbitrator." MME's Third Circuit Brief at 24. Indeed, as noted in MME's brief at pages 24-25 note 7, TXU's counsel conceded this very point in the district court:

> THE COURT: The scope of the arbitrator's authority is determined by looking both at the arbitration agreement and its scope and the scope of the submission. Correct?
>
> MR. HABERER: That's correct.

Appendix of the Record in the Third Circuit, at A813-814.

In its statement of the relevant standard of review, MME pointed out that, in conducting its independent review, the district court made several findings of fact, including that "the record in this matter does not support TXU's contention that MME and TXU submitted to the arbitrators issues regarding the terms of the spot gas contract and whether TXU's pricing pursuant to the spot gas contract was reasonable." MME's Brief at 16-17. MME argued that these findings were not clearly erroneous and, thus, "must stand." *Id.* at 17. MME argued further that, in conducting its own independent review in the context of a motion to vacate an arbitration award on the ground that the arbitrators strayed beyond their authority, "the district court ruling on a motion to vacate may make its own factual findings regarding the reasons for which the motion should be denied or granted, and such findings are reviewed for clear error." MME's Brief at 16. In addition, MME argued: "Under the FAA, the standard to be applied by an appellate court in reviewing the district court's decision either vacating or upholding an award is the ordinary standard in any appellate review of a lower court decision finding an agreement between the parties: findings of fact are reviewed

under the clearly erroneous standard while questions of law are reviewed *de novo*." MME's Brief at 16 (citing *First Options*).

MME clearly asserted its argument in the Third Circuit. More important, the Third Circuit plainly considered and rejected the district court's independent approach, together with MME's arguments in support of that approach. TXU's waiver argument is baseless, and the record demonstrates that the Third Circuit squarely resolved the question presented by rejecting MME's arguments.

IV. TXU's Factual Contention Regarding The Submission Of The Issues Is Erroneous And Irrelevant.

Finally, TXU opposes MME's Petition by challenging the district court's factual determination that MME never agreed to submit the issue of the reasonableness of TXU's spot gas sales. As noted, the Third Circuit never addressed this issue because it set aside the district court's analysis in its entirety. Moreover, as noted, the mere fact that TXU presented arguments on the issue did not bind MME to "submit" the issue for arbitration. In any event, inasmuch as the Third Circuit did not address TXU's factual challenge, TXU's contention provides no basis to deny certiorari review of the question presented. If TXU wishes to pursue its factual challenge, it may do so on remand under a correct standard of review.

CONCLUSION

For the foregoing reasons and the reasons set forth in MME's Petition, the Court should grant certiorari in this case.

Respectfully submitted,

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